No. 89-221

In The

Supreme Court of the United States

October Term, 1989

DAVID AND JEANNE HEARN,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a state law diversity case may the Court of Appeals change a decision of the Supreme Court of Alaska, which specifically held that pre-judgment interest must be paid in addition to insurance policy facial limits, to a holding it believes to be "better"?

2. May the Court of Appeals contravene longstanding and controlling State precedent that insurance coverage exists if a lay person would expect such, that all ambiguities are resolved in favor of the insured, and that insurance policies are to be read broadly allowing coverage whenever possible?

3. May the Court of Appeals ignore this Court's Erie Doctrine of 1938 and revert to a federal common law when faced with a question involving state insurance law?

4. May the Court of Appeals ignore timely requests for certification when by its own statement it believes the language of the Supreme Court of the State of Alaska ". . . [i]s not a model of clarity"?

5. May the Court of Appeals ignore a dispositive admission of a party, thus compounding its refusal to follow Alaska precedent?

LIST OF PARTIES

The parties to the proceedings before the Court of Appeals were the Petitioners, David Hearn and Jeanne Hearn (Hearns), and the Respondent, State Farm Automobile Insurance Company (State Farm). These are the parties in this Petition for Certiorari. Respondent's parents, subsidiaries, and affiliates are unknown. In the proceedings before the District Court, Randy A. Schaal and insured Laura L. Schaal were also defendants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners David and Jeanne Hearn respectfully pray that a writ of certiorari issue to review the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 27, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is not reported. The Memorandum Decision issued on February 27, 1989, was modified and rehearing denied on May 10, 1989, and a second request for rehearing denied on June 13, 1989. Respondent's request that the Memorandum Decision be published was also denied.[1] All are reprinted in the Appendix hereto.

JURISDICTION

This action was originally brought by Respondent State Farm in United States District Court for Alaska as a diversity declaratory judgment action as to whether there was insurance coverage for all pre-judgment interest. On cross-motions the District Court ruled that State Farm was liable for pre-judgment interest under the express terms of the applicable insurance policy. (Appendix D) The Court of Appeals reversed, declining to follow Alaska authority. (Appendix A) Rehearing was first denied and the opinion modified on May 10, 1989 (Appendix B), and again on June 13, 1989. (Appendix C)

The jurisdiction of this Court to reverse the judgment of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. 1254(1).

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[1] See Appendix I. These statements of Respondent State Farm underline both the Court of Appeals' errors and the appropriateness of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The decision of the Court of Appeals runs afoul of the Federal Judiciary Act, 28 U.S.C. § 1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.

The decision also runs afoul of Article III, Section 2, Clause 1 of the United States Constitution, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

I. INTRODUCTION

The insurance policy at issue provides in pertinent excerpted part, "In addition to the limits of liability we will pay for an insured any interest on all damages owed by the insured as a result of a judgment." Extensive Alaska case law requires that insurance coverage exists which a lay person can reasonably expect given a lay reading of the policy. Coverage is to be construed broadly, and all ambiguities are to be resolved in favor of the insured. The Alaska District Court found that this policy language accordingly obligated the insurer to pay all pre-judgment interest. As a direct result of the District Court's ruling, State Farm amended all its insurance policies throughout the United States to specifically exclude any pre-judgment interest. In May of 1988 while this case was pending for decision before the Court of Appeals the Alaska Supreme Court specifically held that an insurer is obligated to pay pre-judgment interest in addition to stated policy limits. The Court of Appeals ignored the long-standing Alaska precedent and rewrote the 1988 Opinion with which it is in unavoidable conflict, thereby violating the doctrine of *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938). The Court of Appeals has also refused to certify this question to the Supreme Court of Alaska in derogation of *Lehman Brothers v. Schein,* 416 U.S. 386, 391-92 (1974).

Petitioners recognize that review of a Court of Appeals decision interpreting state law in a diversity case is not favored. *Haring v. Prosise,* 426 U.S. 306, 314 n.8 (1983). However, this is far from the ordinary case of the Court of Appeals misinterpreting state law. This is a case in which the Court of Appeals has not only refused to follow a long line of explicit state law, but has literally altered a specific ruling of the Alaska Supreme Court to language it believes to be "better."

The Court of Appeals has literally rewritten dispositive Alaska authority to conform to its views of how the law of Alaska should be when it held: "The sentence in the opinion [obligating

the insurer to pay pre-judgment interest] . . . might better have read . . . "

Petitioner emphasizes that this is not a stand alone challenge to a state law determination by the Court of Appeals. The facts of this case are that a Court of Appeals has refused to follow the controlling precedent of the Supreme Court of Alaska, rewriting that language with which it disagrees, and has repeatedly ignored Petitioner's request for certification.

II. FACTUAL BACKGROUND

The specific state law question presented in this case is whether State Farm is liable to pay pre-judgment interest to the Hearns under an automobile insurance policy whose relevant language reads as follows:

> In addition to the limits of liability, we will pay for an insured any costs listed below resulting from such accident.
>
> 1. Court costs of any suit for damages.
>
> 2. Interest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage. (emphasis in original insurance policy)

The key words are "In addition," "we will pay," "for an insured," "interest on all damages" and "owed by an insured." Despite this clear policy language that "In addition to the limits of liability, we will pay for an insured . . . any . . . interest on all damages owed by the insured as a result of a judgment . . ."[2], the Memoranda Panel has nonetheless determined that the use of the word "interest" in the policy applies only to post-judgment

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[2] This phrase appropriately excerpts the identified critical language and its modifiers, emphasis in original.

interest. This holding is clearly erroneous, contrary to specific Alaska decisional authority, and has significant adverse impact not only on the Hearns but on State Farm policyholders across the country.[3]

The Court of Appeals failed to follow the Alaska caveat that the provisions of an insurance policy are construed in Alaska to provide the coverage which a lay person can reasonably expect given a lay interpretation of the policy language and such coverage shall be construed broadly with all ambiguities resolved in favor of the insured. It seems beyond argument that the phrase "Interest on all damages" would cause a lay person to reasonably expect that this would include both pre-judgment and post-judgment interest particularly when pre-judgment interest is nowhere separately identified or excluded.

The Court of Appeals has also by its own admission literally, and without precedent, actually rewritten the controlling decision of *Schultz v. Travelers Indemnity Co.*, 754 P.2d 265 (Alaska 1988) which held, ". . . 100,000 per passenger . . . plus pre-judgment interest, is policy limits." This 1988 statement of the Alaska Supreme Court that an insurer is obligated to pay pre-judgment interest in addition to the face amount of an insurance policy is directly and unequivocally at odds with the Court of Appeals' Decision herein. In addressing this obvious conflict the Court of Appeals states only that "[t]he Court's language was not a model of clarity" and then proceeds to literally rewrite the Alaska Opinion with language it describes as "better."

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[3] For this reason, the Hearns were joined in their request for rehearing by amicus Alaska Trial Lawyers Association. See Appendix K.

REASONS FOR GRANTING CERTIORARI

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONTRAVENTION WITH THE ALASKA SUPREME COURT DECISION OF *GUIN v. HA.*

The District Court in Alaska ruled in the Hearns' favor, noting it was State Farm's skilled underwriters who chose to incorporate an open-ended clause agreeing to pay "interest on all damages." The District Court accordingly concluded that a reasonable lay person insured by this policy would understand that all interest was covered by the subject clause. (Appendix D) The District Court noted that State Farm had long been on notice that interest under Alaska law is calculated on all damages from the date of loss, succinctly noting (Appendix D, p. 3):

> The aforementioned language quoted by State Farm from Long is indeed an industry standard. However, State Farm chose not to use the language contained in the industry standard. Instead, State Farm chose to use language informing the non-drafting party that State Farm would, "[i]n addition to the limits of liability pay," "[i]nterest on all damages owed by an insured as the result of a judgment . . ."
>
> ★ ★ ★ ★
>
> The interest to be paid by State Farm is stated to be that "on all damages owed by an insured." Had State Farm sought to limit its interest liability to the policy limits, it could have substituted the phrase "for which the insurer is liable, or, to the limits of liability" and deleted the language stating that it would pay "[i]n addition to the limits of liability . . . [i]nterest on all damages owed by an insured." There can be no doubt that State Farm intended to place the interest payments outside the "limits of liability."

In an unpublished decision the Court of Appeals found that pre-judgment interest was nonetheless not included, thereby somehow negating explicit policy language providing ". . . In addition to the limits of liability, we will pay for an insured . . . any . . . interest on all damages owed by the insured as a result of a judgment . . ." (Appendix A) The Panel noted only *en passant* that "Although the policy at issue in *Guin,* unlike the policy here, contained no promise by the insured to pay interest (specifically post-judgment interest), we find that difference immaterial."

The difference is extraordinarily material. In *Guin v. Ha,* 591 P.2d 1281 (Alaska 1979), there was no supplementary payments clause dealing with interest in *Guin* as there is here. The *Guin* Court in fact stated:

> In order to hold the insurer liable for such pre-judgment interest, the insurer must have assumed such an obligation in the contract, or alternatively, public policy must intervene and impose the obligation despite the terms of the insurance contract.

Guin noted specifically that:

> Appellant Guin does not attempt to bring her claim for pre-judgment interest within any express provision of the insurance policy.
>
> ★ ★ ★ ★
>
> Finally, interest is nowhere mentioned in the contract of insurance. Nothing in the supplemental payment clause can be construed as imposing upon the insurer the obligation to pay pre-judgment interest.

Id. at 1284, 1285 and 1289, respectively.

Despite the above explicit language stating that policy language can embrace pre-judgment interest, the Court of

Appeals is apparently of the mistaken belief that *Guin* requires that an insurer can never be liable for pre-judgment interest regardless of the policy language. Nothing could be further from the truth. The *Guin* court itself stated succinctly that "In order to hold the insurer liable for such pre-judgment interest, the insurer must have assumed such an obligation in the contract . . ."

The Alaska Supreme Court has not only recognized that an insurer can be obligated to pay pre-judgment interest but it told specifically how "the insurer must have assumed such an obligation in the contract." That is in fact specifically what has occurred in the case at bar. The *Guin* court simply held that as pre-judgment interest was nowhere mentioned in the insurance contract and had not been bargained for, that pre-judgment interest would not be automatically assessed against the insurer as a matter of public policy, even though it remained the insured's obligation. In the second to the last paragraph of the Opinion, the *Guin* court clearly said:

> Furthermore, the insured defendant need not be caught in the bind of pre-judgment interest liability. The insured may protect himself by obtaining additional insurance coverage in an amount sufficient to include pre-judgment interest which otherwise would exceed applicable policy limits.

In accordance with the Alaska Supreme Court's suggestion, the insured here, Schaal, did obtain additional insurance coverage to cover pre-judgment interest. The chosen emphasis by State Farm on the insured in the contract language underlines this inescapable fact.

The Court of Appeals even materially misquotes the operative policy language: (Appendix A, pp. 4-5)

> Under *Guin* then, the phrase in the State Farm policy "all damages owed by an insured as the result of a judgment" must likewise be construed to include pre-judgment interest. Accordingly, the

> interpretation that best comports with *Guin* is to construe the term "Interest" in State Farm's "interest clause" as post-judgment interest, accruing from the time of judgment or settlement until the insurer's tender of payment.

The purported State Farm policy language set forth by the Memoranda Panel is notably factually incomplete. Omitted from that critical phrase are the first two words "interest on." The correct recitation of the operative language of the supplementary payments sentence is then "[I]nterest on all damages owed by an insured as a result of the judgment." The corrected inclusion again demonstrates the gross error of the Panel's Memoranda.[4]

II. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THE ALASKA SUPREME COURT'S DECISION IN *SCHULTZ v. TRAVELERS INDEMNITY COMPANY.*

In *Schultz* the Alaska Supreme Court was called upon to determine what constituted the maximum limits of insurance coverage under a particular insurance policy that had a facial limit of $100,000.00 per passenger, the same as in the case at bar. The Alaska Supreme Court described the case and its process:

> In determining what constitutes the maximum limits of insurance coverage, i.e., policy limits, it is necessary for the court to review the contractual obligations undertaken by the insurer in the insurance policy in question in light of the applicable statutes, regulations and court opinions which have addressed this issue. The insurance policy here provides a face value limit of $100,000

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[4] If "damages" is to include "interest," then the corrected full provision would not read "Interest on all damages . . . "

per passenger. Therefore, Travelers had a duty, under the principles discussed above, to tender the face value of $100,000 to each plaintiff.

The insurance contract also obligated Travelers to pay unlimited court costs. This language, as construed by the Alaska Supreme Court, obligates Travelers to pay Rule 82 attorney's fees as an additional item of policy coverage on the full amount of a jury verdict rendered against the insured defendant. *Guin v. Ha,* 591 P.2d 1281, 1285-86 [(Alaska 1979)]; *Weekman v. Houger,* 464 P.2d [528] (Alaska 1970); *Continental Insurance Co. v. Bayless and Roberts, Inc.,* 608 P.2d [281] (Alaska 1980).[5]

This case did not proceed to trial. The plaintiffs made their policy limits demand. The parties then engaged an economist, Dr. Richard Solie, to project the plaintiffs' economic losses and stipulated the values of plaintiffs' non-economic losses. The question presented to the court is whether, under these circumstances, policy limits should be defined in the same manner as if this case had gone to trial. The court agrees with the plaintiffs that policy limits in this situation includes the amount of attorney's fees which would have been awarded had this case gone to trial.

This holding is required, at least by implication, by the Alaska Supreme Court opinion in *Continental Insurance Co. v. Bayless and Roberts,* 608 P.2d 281, 285, n.6 and 295-96, n. 22 (Alaska 1980). See [also] *Salmine v. Knagin,* 645 P.2d 148, 150, n. 8 (Alaska 1982); *Insurance Co. of North*

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[5] Of particular note is the Court's citing of *Guin v. Ha* for this proposition.

> *America v. State Farm Mutual Auto Insurance Co.*, 663 P.2d 953, 954, n. 1 (Alaska 1983). Travelers had the legal duty to make a determination as to the amount of a money judgment which might be rendered against its insured. In order to protect its insured, Travelers then had the duty to tender in settlement that portion of the projected money judgment which Travelers contractually agreed to pay. That amount, $100,000 per passenger, plus Rule 82 fees on the sum of the projected verdict plus pre-judgment interest, is policy limits. (Emphasis supplied.)

Of critical importance here is the concluding language of *Schultz* stating "that amount, $100,000 per passenger, plus Rule 82 fees on the sum of the projected verdict PLUS PRE-JUDGMENT INTEREST, is policy limits." (Emphasis supplied.) The Alaska Supreme Court has thus held directly that pre-judgment interest is to be identified and computed separately. This was a unanimous Per Curiam decision of the Alaska Supreme Court and is in direct conflict with the Court of Appeals. Indeed the Court of Appeals is in direct defiance of *Schultz*. In its original Memorandum the Court of Appeals noted only that *Schultz* "does not change the legal principles established in *Guin v. Ha,* 591 P.2d 1281 (Alaska 1979)." (Appendix A, p. 5) A correct statement is that *Guin v. Ha* did not establish that pre-judgment interest could never be an obligation of the insurer and *Schultz* is a subsequent case where an insurer was specifically held so liable under the language of that insurance contract. In its amended Memorandum the Court of Appeals apparently and by necessity retreated from its belief that there was "no change" and decided instead that this conflict required it to simply rewrite the words it did not like.

It is clear from the explicit language of *Schultz* that the Alaska Supreme Court has held that the facial amount of the policy plus pre-judgment interest is "policy limits." This means the Petitioner Hearns should have prevailed in the Court of Appeals as they had in the District Court. Pre-judgment interest is to be added to the declared limits to determine policy limits.

Schultz was even decided after the District Court decision while this case was on appeal. The District Court had decided the issue in the Hearns' favor based on pre-*Schultz* existing Alaska law.

In *Schultz,* as with the case at bar, interest is mentioned specifically in the insurance contract. The relevant supplementary payments language in *Schultz* stated:

> Additional Liability Coverage.
>
> Interest. We will also pay any interest on any part of a judgment we are paying.

The language in *Schultz* is even more focused on identifying only post-judgment interest than in the case at Bar where the State Farm policy provides that any interest on all damages shall be paid by the insurer. Nonetheless, even under this more restrictive language, the Alaska Supreme Court held in 1988 that the insurer was obligated for pre-judgment interest and that this was included within the concept of "policy limits." The Court of Appeals does not even attempt to distinguish this unavoidable conflict of law even though supplemental briefing was offered on that very issue.

Indeed, the Court of Appeals has expressly refused to follow the Alaska Supreme Court stating that *Schultz's* clear language "'might better have read [t]he policy limits in this case comprise $100,000.00 per passenger and, in addition, Rule 82 attorney fees computed as a percentage of the sum of the projected verdict and pre-judgment interest." (Appendix B, pp. 1-2) But this "better" language of the Court of Appeals is not the language of the parties' contract or of the Alaska Supreme Court in *Schultz.* Indeed, this "better" language completely reverses the meaning of the Alaska Supreme Court.[6]

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[6] The Court of Appeals alleges that the sentence in question is not a true "holding." "Holding" is defined by Blacks as:

> 3. To adjudge or decide, spoken of a court, particularly to declare the conclusion of law reached by the court as to the legal effect of the facts disclosed.

The language of the Alaska Court in *Schultz* is a conclusion of law reached as to the legal effect of the facts disclosed.

III. THE COURT OF APPEALS' DECISION IS ALSO IN DIRECT VIOLATION OF *STORDAHL v. GOVERNMENT EMPLOYEES INSURANCE COMPANY.*

As was recognized by the District Court as well known, under Alaska law the provisions of an insurance policy are construed to provide the coverage which a lay person would reasonably expect given a lay interpretation of the policy language. *Stordahl v. Government Employees Insurance Company,* 564 P.2d 63, 66 (Alaska 1977). Such coverage must be construed broadly with any ambiguities resolved in favor of the insured. *Hahn v. Alaska Title and Guaranty Company,* 557 P.2d 143, 144-145 (Alaska 1976). The Court of Appeal's finding that the word "damages" irretrievably and exclusively embraces the concept of pre-judgment interest flies directly in the face of not only *Guin,* as noted above, but also the basic premise of Alaska decisional law that coverage exists when a lay person would have reasonably expected it. The operative language in the policy in question is:

> In addition to the limits of liability, we will pay for an insured . . . any . . . interest on all damages owed by the insured as a result of a judgment . .

State Farm specifically agreed to pay, in addition to the facial limits of liability, any interest on all damages owed by an insured. A lay person would naturally assume that any interest on all damages would include pre-judgment interest.[7] Guin did not involve interpretation of language at all. The question there was only whether pre-judgment interest should be awarded against the insured as a policy matter when the insurance contract

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[7] The Supplementary Payment section defines interest as a cost and then specifies that any costs, i.e., interest, will be paid in addition to the stated limits of liability. The Court of Appeals also ignored State Farm's use of the word "any" as it applied to interest.

is silent. In the case at bar, there is admitted language addressing the subject of interest, yet the Court of Appeals has failed to address the lay person's reasonable expectations, again in direct violation of the Alaska Supreme Court law.[8]

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[8] The Court of Appeals is in error also when it states that the District Court did not consider *Guin v. Ha, supra*. *Guin* was specifically argued in the Hearns' and State Farm's Motions for Summary Judgment.

The Court of Appeals also ignored additional relevant and controlling authority issued by the Alaska Supreme Court while this matter was pending on rehearing:

> It is well established that we treat insurance policies as contracts of adhesion when interpreting policy language. *Jarvis v. Aetna Cas. & Sur. Co.*, 633 P.2d 1359, 1363 (Alaska 1981); *U.S. Fire Ins. Co. v. Colver*, 600 P.2d 1, 3 (Alaska 1979). Accordingly, we construe them "so as to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms." *U.S. Fire Ins. Co.*, 600 P.2d at 3. See also *Starry v. Horace Mann Ins. Co.*, 649 P.2d 937, 939 (Alaska 1982). To determine what is objectively reasonable, the court will look at the contract terms. See *O'Neill Investigations, Inc. v. Illinois Employers Ins. Of Wausau*, 636 P.2d 1170, 1176-1177 (Alaska 1981). See generally R. Keeton, *Insurance Law*, Section 6.3, at 351-57 (1971). Accord *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985). The terms should be interpreted in an ordinary and popular sense as would a man of average intelligence and experience. See *Jarvis*, 633 P.2d at 1363. This principle reflects our awareness that long and complicated insurance policies are not always thoroughly examined by policyholders and that a "lay person's expectation of insurance coverage . . . [is] formed by many factors besides the language of the policies themselves." *O'Neill Investigations*, 636 P.2d at 1177. Additionally, insurance coverage provisions should be broadly construed while exclusions are to be interpreted narrowly against the insured. *Starry*, 649 P.2d at 939.

Whispering Creek et al. v. Alaska National Insurance Company, Op. No. 3431, May 5, 1989. This Opinion of the Supreme Court of the State of Alaska was not commented upon, despite the Hearns' urgings as to its relevance.

IV. THE COURT OF APPEALS IGNORED A DETERMINATIVE ADMISSION OF STATE FARM WHICH COMPOUNDED ITS REFUSAL TO FOLLOW ALASKA PRECEDENT.

As a direct result of the District Court Decision in the Hearns' favor, State Farm amended its standard automotive insurance policy across the United States to exclude all pre-judgment interest. This amendment is a part of the record before the Court of Appeals and was actually appended to the Hearns' Brief before the Memoranda Panel and is included here as Appendix F. It contains a dramatic admission by State Farm of the fact that the Hearn policy did contain the obligation to pay pre-judgment interest. The specific language of that amendment which changed the Hearn insurance policy language after the District Court Decision is as follows:

> Important Information About Changes In Your Car Policy . . .
>
> State Farm has made some changes in your car policy. The change under Liability Coverage results in a restriction of coverage, while the other changes merely clarify your coverage. Please determine the coverages you carry and note changes which apply to you.
>
> Under Liability — Coverage A.
>
> If the law requires you to pay interest for a period of time before a judgment is entered against you, we will pay the interest on that portion of the judgment that is payable under your policy. This does not change our obligation to pay interest that accumulates after a judgment is entered.
>
> ★ ★ ★ ★
>
> In consideration of the premium charged, it is agreed that your policy is changed as follows:

1. LIABILITY — COVERAGE A

Item 2 under "In addition to the limits of liability, we will pay for an insured any costs listed below resulting from such accident," is changed to read:

a. after the judgment, and until we pay, offer or deposit in court, the amount due under this coverage: or

b. before the judgment, where owed by law, but only on that part of the judgment we pay.

This spectacular admission by State Farm that payment of only partial pre-judgment interest and complete post-judgment interest means less coverage than before was not even commented upon by the Memoranda Panel. This amendment, like *Schultz*, apparently conflicted with its personal view of how the law of Alaska should be. The admission of State Farm was apparently more difficult to rewrite than an opinion of the Alaska Supreme Court and hence the Panel determined it should be ignored.

V. THE COURT OF APPEALS' DECISION IS AN UNCONSTITUTIONAL VIOLATION OF THE FEDERAL JUDICIARY ACT AND ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES.

Article III of the Constitution of the United States provides inter alia that "judicial power shall extend . . . to controversies . . . between citizens of different states . . . " The Federal Judiciary Act has provided, since 1789:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652. Together, they require that in the exercise of diversity jurisdiction, "except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78 (1938). *Erie* has been interpreted as limiting federal courts in diversity cases where state common law rather than statute law applies to the essentially mechanical task of simply identifying and applying relevant state court precedent.

This Court has required federal diversity courts to follow precisely whatever state precedent was relevant. See e.g., *Bernhardt v. Polygraphic Company,* 350 U.S. 198, 205 (1956); *Fidelity Union Trust Company v. Field,* 311 U.S. 169, 178 (1940); *Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 465 (1967). A Federal court in a diversity case does not possess the full freedom of the state common law court to articulate and develop common law. The Federal Courts are in the position of a court applying the law of a foreign jurisdiction. Because the law it applies is not its own, its chief task is to describe the law and not to make it. Indeed, a Federal Court adjudicating a state created right solely because of diversity of citizenship of the parties is for that purpose and effect another court of the state, here Alaska. *Guaranty Trust Company v. York,* 326 U.S. 99, 108 (1945).

In the case at bar the Court of Appeals' statement that *Guin* requires in all circumstances that pre-judgment interest not be paid by an insured is directly contrary to the actual language of the Alaska Supreme Court in *Guin,* is in defiance of *Stordahl* that coverage exists when a lay person would have reasonably expected it to exist, and flies directly in the face of *Schultz* which specifically held that pre-judgment interest is in addition to facial policy limits. As such the Court of Appeals stands in violation of the Constitution of the United States and must be reversed.

VI. THE ISSUE PRESENTED IN THIS CASE SHOULD HAVE BEEN CERTIFIED TO THE SUPREME COURT OF THE STATE OF ALASKA.

That this is a case of state law is admitted by the Court of Appeals. That the Court of Appeals is in defiance of Alaska law is specifically articulated in *Schultz:*

> In order to protect its insured, Travelers then had the duty to tender in settlement that portion of the projected money judgment which Travelers contractually agreed to pay. That amount, $100,000.00 per passenger, plus Rule 82 fees on the sum of the projected verdict, plus pre-judgment interest is policy limits.

Schultz at p. 267. (emphasis supplied)

The Hearns have on many occasions attempted to get this question certified to the Supreme Court of the State of Alaska. On February 14, 1986, the Hearns filed with the District Court a Request for Certification of a Question of Law to the Alaska Supreme Court. (Appendix G) At oral argument the Court of Appeals actually inquired of counsel as to their position on certification. At oral argument and in a subsequent letter, counsel for Hearns once again stated that certification was appropriate. (Appendix H) In supplemental briefing requested by the Court of Appeals with regard to *Schultz,* the Hearns again asserted that the Court of Appeals should certify the question to the Alaska Supreme Court. Finally the Hearns moved again on rehearing that the case be certified to the Alaska Supreme Court, which request was ultimately denied.

The Alaska Supreme Court may answer questions of state law if the case involves Alaska state law questions which "may be determinative of the cause" pending and if the Court of Appeals questions the status of Alaska law. Alaska Appellate Rule 407(a). (Appendix J)

In reversing and remanding for a similar determination of Certification, this Court noted:

Here resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

> "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499, 61 S.Ct. 643, 644, 85 L.Ed. 971 (1941).

See also *MacGregor v. State Mutual Life Assur. Co.*, 315 U.S. 280, 281, 62 S.Ct. 607, 86 L.Ed. 846 (1942); *Reitz v. Mealey*, 314 U.S. 33, 39, 62 S.Ct. 24, 28, 86 L.Ed. 21 (1941).

The judgment of the Court of Appeals is vacated and the cases are remanded so that that court may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules.

Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974). In the case at bar judges from Arizona, Washington, and California seek to change Alaska law. The only Alaska Federal Judge to consider the case, Judge Holland, ruled in the Hearns' favor.

Under these strikingly parallel circumstances, it was an abuse of discretion for the Court of Appeals to not certify this question to the Alaska Supreme Court.[9]

This case even presents significantly stronger facts than in *Lehman Brothers v. Schein,* supra. In the case at bar there is no doubt as to local law and an overt refusal to follow the undoubted language of the Supreme Court of Alaska. Further, Petitioners have made repeated requests for certification which requests have been simply ignored. At the very least, the Court of Appeals should be required to consider whether the controlling issue of Alaska law should be certified to the Supreme Court of Alaska as was done in *Lehman.*

---

[9] Justice Rehnquist in concurrence noted that requests for certification should not be delayed until after the Court of Appeals decision. Here, Petitioners initially requested certification to the District Court, which court ruled in Petitioners' favor, and many times renewed these requests to the Court of Appeals, which requests were ignored.

CONCLUSION

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and review. The Erie Doctrine of controlling state law must be enforced if it is to remain viable. The Court of Appeals should not be allowed to change State precedent in a State law diversity action.

Respectfully submitted,

Robert H. Wagstaff
912 West Sixth Avenue
Anchorage, AK 99501-2024
(907) 277-8611

August 8, 1989

No. _____

In The

Supreme Court of the United States

October Term, 1989

DAVID AND JEANNE HEARN,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Robert H. Wagstaff, Esq.
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Counsel for Petitioners

APPENDIX A

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant

v.

DAVID HEARN; JEANNINE HEARN,
Defendants-Appellees

No. 87-3752
D.C. No. CV-86-001-HRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
H. Russell Holland, District Judge, Presiding

Argued and Submitted February 4, 1988
Seattle, Washington

Before: FLETCHER and NOONAN,** Circuit Judges, and CARROLL,*** District Judge.

State Farm Mutual Automobile Insurance Co. (State Farm) brought a declaratory judgment action against David and Jeannine Hearn to resolve whether State Farm is liable to pay pre-judgment interest to the Hearns under an auto insurance policy. On cross-motions for summary judgment, the district court ruled in favor of the Hearns, and State Farm appealed. We reverse.

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* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Circuit Rule 36-3.

** Honorary John T. Noonan, United States Circuit Judge for the Ninth Circuit has been drawn to replace Honorary J. Blaine Anderson, who died after argument and submission of this case.

*** Honorary Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

FACTS

In March 1985, while driving in Anchorage, Alaska, Laura Schaal lost control of her vehicle, crossed the median strip, and struck a vehicle occupied by the Hearns, who suffered bodily injuries from the accident. Schaal was insured under a policy issued by State Farm, which provided liability coverage under the following applicable provisions.

> "SECTION I — LIABILITY — COVERAGE A
>
> "...
>
> "We will:
>
> 1. pay damages which an insured becomes legally liable to pay because of:
>
> a. Bodily injury to others, and
>
> b. damages to or destruction of property including loss of its use,
>
> caused by accident resulting from the ownership, maintenance or use of your car; and
>
> 2. defend any suit against an insured for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the accident which is the basis of the lawsuit."

Immediately following the general insuring agreement, the insurance contract also set forth this "interest clause":

> "In addition to the limits of liability, we will pay for an insured any costs listed below resulting from such accident.
>
> "1. Court costs of any suit for damages.
>
> "2. Interest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage."

(Emphasis in original.) The policy also declared a limit of liability for bodily injury of $100,000 per person and $300,000 per

accident. State Farm offered to settle the Hearns' claims arising from the accident for $200,000 (the policy limit), but the Hearns rejected the offer.

DISCUSSION

The only issue before the district court was whether State Farm is liable for paying all pre-judgment interest ultimately assessed against its insured, even though such pre-judgment interest would exceed the policy limits. The district court ruled that the "interest clause" quoted above was ambiguous and therefore had to be construed against the insurer as providing coverage for all pre-judgment interest without respect to the stated limits of liability. We review de novo a district court's interpretation on summary judgment of an insurance contract. *Allstate Ins. Co. v. Ellison,* 757 F.2d 1042, 1044 (9th Cir. 1985).

The policy in question provides coverage, within the policy limits, for "damages which an insured becomes legally liable to pay because of . . . bodily injury to others . . . " (emphasis in original.) Additionally, State Farm's policy agrees to pay specified "costs . . . resulting from such accident," including "[i]nterest on all damages owed by an insured as a result of a judgment until we pay, offer or deposit in court the amount due under this coverage."

State Farm contends that this "interest clause" covers only post-judgment interest. The Hearns contend that the language covers all interest, both pre- and post-judgment, without regard to the limits of liability. The district court agreed with the Hearns, finding that State Farm's policy language "is ambiguous because of its silence as to the handling of pre-judgment interest. State Farm chose language which on its face appears broadly to assure liability for interest payments." Mem. at 3. Had State Farm intended to exclude pre-judgment interest from the interest clause, according to the district court, it could have employed standard insurance-industry language stating that "the insurer shall pay":

> all interest accruing after entry of judgment until the company has paid or tendered or deposited in

> the court such part of such judgment as does not exceed the limit of the company's liability thereon.

Mem. at 4 (quoting 2 Long, Liability Insurance § 9.01).

Under Alaska law, the provisions of an insurance policy are construed to provide the coverage which a lay person would have reasonably expected, given a lay interpretation of the policy language. *Stordahl v. Gov't Employees Ins. Co.*, 564 P.2d 63, 66 (Alaska 1977). Coverage should be construed broadly, with ambiguities resolved in favor of the insured. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143, 144-45 (Alaska 1976). The Alaska courts have held that pre-judgment interest accrues from the date of the plaintiff's injury. See *State v. Phillips*, 470 P.2d 266, 274 (Alaska 1970). Pre-judgment interest is deemed to compensate the plaintiff for loss of the use of funds, equivalent to the value of plaintiff's injury, from the date of injury to the date of judgment. See *Guin v. Ha*, 591 P.2d 1281, 1286 (Alaska 1979). The district court concluded that the phrase "interest on all damages" in the State Farm policy could only be reasonably interpreted as obligating the insurer to pay all interest until tender of payment of a judgment or settlement, including pre-judgment interest.

We might be inclined to agree with the district court's conclusion, but for the decision in *Guin v. Ha*, which the district court did not consider. In *Guin*, the Alaska Supreme Court held that an insurer is not liable for pre-judgment interest in excess of policy limits, because pre-judgment interest is an element of damages that comes within the damages liability limit. Id. at 1286-87. Although the policy at issue in *Guin*, unlike the policy here, contained no promise by the insurer to pay interest (specifically, post-judgment interest), we find that difference immaterial. The *Guin* court decided that pre-judgment interest was included within the meaning of the phrase "all sums which the [insured] shall by law be held liable to pay for damages." Id. at 1286 (emphasis in original). Under Guin, then, the phrase in the State Farm policy "all damages owed by an insured as the result of a judgment" must likewise be construed to include pre-judgment interest. Accordingly, the interpretation that best comports

with *Guin* is to construe the term "Interest" in State Farm's "interest clause" as post-judgment interest, accruing from the time of judgment or settlement until the insurer's tender of payment.[1]

CONCLUSION

We REVERSE the district court's grant of summary judgment for the Hearns and denial of summary judgment for State Farm. Summary judgment should be entered in favor of State Farm.

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[1] *Schultz v. Travelers Indemn. Co.*, 754 P.2d 265 (Ak. 1988) does not change the legal principles established in *Guin v. Ha.*

APPENDIX B

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant

v.

DAVID HEARN; JEANNINE HEARN,
Defendants-Appellees

No. 87-3752
D.C. No. CV-86-001-HRH

ORDER

Before: FLETCHER and NOONAN, Circuit Judges, and CARROLL,* District Judge.

The memorandum disposition filed February 27, 1989 is amended as follows:

Footnote 1 is amended to read:

> *Schultz v. Travelers Indem. Co.*, 754 P.2d 265 (Ak. 1988) does not change the legal principles established in *Guin v. Ha. Schultz* simply held that the attorney's fees payable under the policy were to be calculated as a percentage of the sum of the verdict and pre-judgment interest. The case did not hold that the policy limits included pre-judgment interest. Whether pre-judgment interest was included in the policy limits was not an issue before the court. Allowance of attorneys' fees was the only issue. The court's language was not a model of clarity. The sentence in the opinion, "That amount, $100,000 per passenger, plus Rule 82

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*Honorary Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

> fees on the sum of the projected verdict, plus pre-judgment interest, is policy limits." 754 P.2d at 267 might better have read: "The policy limits in this case comprise $100,000 per passenger and, in addition, Rule 82 fees computed as a percentage of the sum of the projected verdict and pre-judgment interest." Read in context, however, the meaning of the sentence in the opinion is unmistakable.

Defendants-Appellees' Supplementary Exhibit in Support of Motion for Rehearing is ordered filed.

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Noonan have voted to reject the suggestion for rehearing en banc and Judge Carroll has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant

v.

DAVID HEARN; JEANNINE HEARN,
Defendants-Appellees

No. 87-3752
D.C. No. CV-86-001-HRH

ORDER

Before: FLETCHER and NOONAN, Circuit Judges, and CARROLL,* District Judge.

The motion in the alternative to accept defendants/appellees Hearns' second petition for rehearing, certify a question to the Alaska Supreme Court, submit for a rehearing en banc, and/or stay the mandate is denied.

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*Honorary Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation,
Plaintiff

v.

RANDY A. SCHAAL, LAURA L. SCHAAL, DAVID HEARN, AND JEANNINE HEARN,
Defendants

No. A86-001 Civil

MEMORANDUM OF DECISION

The court now has before it Defendants' and Plaintiff's motions for summary judgment.

In March of 1985, Laura Schaal lost control of a Dodge Power Ram 50 truck which crossed the meridian strip on Tudor Road in Anchorage, Alaska, and struck a 1968 Ford pickup driven by Defendant David Hearn in which Jeannine Hearn was a passenger. As a result of the aforementioned accident, David Hearn suffered injuries that rendered him a quadriplegic and Jeannine Hearn also suffered injuries. At the time of the accident, Laura Schaal was insured by Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm").

State Farm has not disputed the liability of Laura Schaal nor its own liability as Mrs. Schaal's insurer. Rather, the only question brought before this court is one of insurance policy interpretation. The policy language at issue provides:

> In addition to the limits of liability, we will pay for an insured any costs listed below resulting from such accident.
>
> . . . .

> 2. Interest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage. [Emphasis in original.]

The issue presented is: what is "the amount due under this coverage" which must be forthcoming to terminate the accrual of interest for which State Farm is liable?

State Farm moves for summary judgment, arguing that pre-judgment interest is payable only up to the policy limits of the insurance policy issued by State Farm to Laura Schaal. Defendants David Hearn and Jeanne Hearn contend that pre-judgment interest owed by State Farm is not limited to the stated policy limits of liability.

Defendants ask this court to find that State Farm is obligated under the policy to pay pre-judgment interest on all damages awarded against its insured. Defendants argue that the subject insurance policy requires State Farm to pay, in addition to the stated policy limits, all interest, including pre-judgment interest, on any judgment eventually obtained against co-Defendant Schaal.

Under Alaska law, the provisions of an insurance policy "should be construed to provide the coverage which a layperson would have reasonably expected, given a lay interpretation of the policy language." *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63, 66 (Alaska 1977); *Weaver Brothers, Inc. v. Chappel,* 684 P.2d 123, 125 (Alaska 1984). The Alaska courts adhere to the principle that provisions of coverage should be construed broadly and exclusions interpreted narrowly. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143, 145 (Alaska 1976). When a court reviews insurance policy provisions, "ambiguities are to be construed in favor of the insured." Id. at 144. In case of doubt or ambiguity, special provisions should prevail over more general ones. *Couch on Insurance (Second)* §15:71 at 323 (rev. ed. 1984).

In the present case, the interest payment clause of Plaintiff's insurance policy is ambiguous. The clause here in question is

ambiguous because of its silence as to the handling of pre-judgment interest. State Farm chose language which on its face appears to broadly assure liability for interest payments. Defendants argue that the unqualified phrase "interest on all damages" should be construed to include both pre-judgment interest and post-judgment interest.

Defendants contend that if State Farm intended to limit its liability for interest, it could have used appropriate language to achieve that result. For instance, had State Farm intended the policy to contemplate payment for post-judgment interest only, the standard language: "which accrues after the entry of the judgment" might have been inserted after the policy phrase in question. Further, had State Farm sought to limit the total amount of interest which would constitute part of "the amount due under this coverage," those amounts could have been related to the limits of the insurer's liability. Such practice is standard in the insurance industry and, as State Farm points out, is exemplified by the following quotation from Long's treatise on liability insurance:

> The standard liability insurance policy provides that the insurer shall pay "all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon."

2 Long, *Liability Insurance* § 9.01.

The aforementioned language quoted by State Farm from Long is indeed an industry standard. However, State Farm chose not to use the language contained in the industry standard. Instead, State Farm chose to use language informing the non-drafting party that State Farm would, "[i]n addition to the limits of liability," pay "[i]nterest on all damages owed by an insured as the result of a judgment . . . "

In *Liberty National Insurance Co. v. Eberhart,* 398 P.2d 997 (Alaska 1965), the Alaska Supreme Court noted that if an insurer:

> [W]ished to contract to pay only a proportionate share . . .based upon the applicable limit of liability in the policy, it easily could have used appropriate language to achieve that result.

Id. at 1000. The policy in *Eberhart,* like the policy in the present case, provided that certain enumerated expenses, including court costs and interest on a judgment "are payable by the company in addition to the applicable limit of liability under this policy." Id. at 999. The court held that such broad language, absent any relevant limiting clause, obligated the insurer to pay "the total cost assessed against its insured." Id. at 1000.

In noting that the insurer may easily insert clear limitations to its liability in the policy if it so desires, the court in *Eberhart* cited *River Valley Cartage Co. v. Hawkeye-Security Insurance Co.,* 161 N.E.2d 101 (Ill. 1959). *Eberhart,* 398 P.2d at 1000. In *River Valley* the Illinois Supreme Court dealt not with the costs provision, but with an interpretation of the interest portion of a costs and interest clause virtually identical to that in *Eberhart.*

In the present case, there is no express limitation on the language in question ("Interest on all damages owed by an insured as the result of a judgment.") The interest to be paid by State Farm is stated to be that "on all damages owed by an insured." Had State Farm sought to limit its interest liability to the policy limits, it could have substituted the phrase "for which the insurer is liable, or, to the limits of liability" and deleted the language stating that it would pay "[i]n addition to the limits of liability . . . [i]nterest on all damages owed by an insured." There can be no doubt that State Farm intended to place the interest payments outside the "limits of liability."

The only reasonable interpretation of the clause in question (especially in light of the insurance carrier's duty to defend which places it in control of the litigation) is that the carrier pays all interest until a settlement is reached or a judgment is rendered and payment tendered under the policy. Such is the most obvious and plain meaning of the words:

> Interest on all damages owed by the insured as the result of a judgment . . .

There are two reasons why it is not reasonable to construe the above language to have application only to post-judgment interest. Firstly, under long-standing Alaska law, interest on personal injury claims accrues from the date of injury until paid, whether by agreement or after judgment. *State v. Phillips,* 470 P.2d 266, 274 (Alaska 1970). Pre-judgment interest is incorporated into Alaska judgments as an item recoverable by Plaintiffs. *Davis v. Chism,* 513 P.2d 475, 481 (Alaska 1973). As a consequence, pre-judgment interest literally becomes "owed by the insured as a result of a judgment." One may argue that there is a technical distinction between "damages" and "interest" which is incorporated into a judgment; but this distinction is of no consequence here. A reasonable layman would not make this kind of distinction. A layman would, as this Court must, read all of the pertinent language as a whole (*Stordahl v. Government Employees Insurance Co.,* 564 P.2d at 66); and, when this is done, the Court concludes that a reasonable lay person reading the entire clause would understand that Plaintiff agreed to pay all interest which is owed by the insured as a result of a judgment.

It is of course true that much litigation of the nature covered by Plaintiff's policy is settled. Nevertheless, all insurance company parties to such proceedings know that their insured is exposed to paying interest and that such interest is included in any judgment payable by the company up to its policy limits on damages and interest. Intelligent and reasonable parties settle with a view to what judgment would likely be rendered if their case were tried with, of course, appropriate compromises to avoid the costs and risks of a trial. Whether by settlement or by trial and judgment, the insurance policy language here in question would reasonably mean to a lay person that the Plaintiff here will pay all interest — pre-judgment and post-judgment — reduced to judgment or agreed upon by the parties as being owed by the insured in settlement negotiations.

Secondly, it is not reasonable to construe the interest clause of the subject policy as applying only to post-judgment interest since to do so would render nugatory the words of the policy: "interest on all damages."

The subject clause does not provide that Plaintiff will pay all interest on damages reduced to judgment (also an ambiguous phrase) or that the company will pay all interest accruing after entry of a judgment (not ambiguous). Were the policy to be worded as first stated, it might arguably render Plaintiff liable for nothing more than post-judgment interest. Were the second above phrase used, Plaintiff would be liable for only post-judgment interest. Rather, the policy language focuses upon "all damages." Interest under Alaska law is calculated on all damages from the date of loss, and Plaintiff has long been on notice of this rule. *Phillips,* 470 P.2d at 274. Unless pre-judgment interest is covered by the language of Plaintiff's policy, the insured gets little or no benefit from the emphasis which Plaintiff placed upon paying "interest on all damages." As already stated, the clause is ambiguous. It must be construed where reasonably possible to give effect to all words employed. The Court concludes that a reasonable lay person insured by this policy would understand that pre-judgment and post-judgment interest were both covered by the subject clause — until Plaintiff, by settlement or after judgment, "pay[s], offer[s], or deposit[s] in court the amount due under this coverage."

The foregoing construction no doubt exposes Plaintiff to very substantial interest liability in a major case. Here it seems quite probable that Plaintiff's interest exposure will be much greater than the $100,000 limit placed upon claims asserted against the insured. Plaintiff argues that the insured would not reasonably bargain for a coverage gap potentially extending from $100,000 to several million dollars of total potential loss to the insured. Plaintiff argues that insurance is designed to protect the insured's assets and that the insured's assets are not protected at all if there is such a gap. The argument is entirely specious.

It is clear here that Plaintiff's insured bargained for up to but no more than the $100,000 coverage limit for the subject claim. The Court presumes that the insured might have — in retrospect, should have — procured greater limits of liability. Seemingly the insured was badly under-insured, but this was a matter of choice for the insured in consultation with an insurance

agent or broker. A coverage decision was made and all concerned must live with it. Similarly, Plaintiff's lawyers and executives determined how they would draft their policy of insurance and, in so doing, wrote a provision for the payment of interest which in retrospect they perhaps regret. Just as Plaintiff must live with the coverage decision which was made when the subject policy was written, so too Plaintiff must live with the language which it placed in that policy.

Moreover, the particular insured's expectations concerning coverage for interest are quite irrelevant to construing the interest clause of the Plaintiff's policy. The question which the Court must answer is how a reasonable lay person would read the language which Plaintiff elected to place in its policy.

It should perhaps be noted that Plaintiff is not helpless here. Insurance companies employ skilled underwriters who evaluate risks to which the company is exposed as a result of its policies of insurance. If the language here construed has caused or in the future causes unanticipated losses to the Plaintiff, it can increase its premiums, or revise its policy terms as regards interest, or both. In this case Plaintiff may indeed face a horrendous loss on its interest clause; but Plaintiff elected to insure its customers for $100,000 maximum coverage (and quite probably for lesser sums as well) with an ambiguous, open-ended interest clause. Plaintiff has long been on notice that in Alaska and elsewhere, insurance policies are viewed as contracts of adhesion (*Continental Insurance Co. v. Bussell,* 498 P.2d 706, 710 (Alaska 1972), and are to be construed as a reasonable lay person would read them (*Stordahl,* 564 P.2d at 66). Under such rules, and with the language here employed, underwriters must have, or should have, perceived that Plaintiff had considerable exposure to pay pre-judgment and post-judgment interest on damages owed by their insureds but in excess of the limits of coverage.

The Court had heretofore circulated to counsel a proposed order as an aid to oral argument. As a result of oral argument, it has become clear that the proposed order impermissibly undertook to rewrite Plaintiff's policy in a way which would soften

the result which we now reach. The Court must take the language of the policy as drawn by Plaintiff. The Court must, where (as here) language is ambiguous, treat the insurance contract as one of adhesion and construe it as would a reasonable lay person. Above all else, the Court cannot rewrite the policy in favor of one side or the other to avoid what it may subjectively view as a harsh result.

In retrospect, and perhaps more importantly, the Court's initial approach to the problem here also opened the possibility for considerable, difficult litigation which would certainly arise repeatedly if the clause in question continues in use. The Court's proposed approach — which is now rejected — would open a new area for litigation over Plaintiff's good faith and reasonableness in estimating what the insured's ultimate loss would be for purposes of a tender of its policy limit. The Court now concludes that no long-term benefit would come from this approach. Indeed, the approach would extend and render litigation such as this even more difficult; and, like some of Plaintiff's arguments, would read out of Plaintiff's policy some of the words expressly employed by the Plaintiff.

In accordance with the order entered heretofore, Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted, and Defendants shall serve and file a proposed final judgment in accordance with the terms of this memorandum decision. The Court's within disposition of Plaintiff's and Defendants' motions shall not be deemed final until such judgment is entered.

DATED at Anchorage, Alaska, this 17th day of January 1987.

H. Russell Holland
United States District Judge

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
an Illinois corporation
Plaintiff,

vs.

RANDY A. SCHAAL, LAURA L. SCHAAL,
DAVID HEARN, and JEANNINE HEARN,
Defendants

No. A86-001 Civil

ORDER
(Summary Judgment Granted)

The Court has heard oral argument on cross-motions for summary judgment in this case and, as a result of oral argument, has concluded that substantial redrafting of its proposed order must be undertaken. In order that the parties may be informed at the earliest possible time of the Court's conclusion which has now been reached, Plaintiff's motion for summary judgment is denied, and Defendants' motion for summary judgment is granted.

The Court has concluded that there are no material issues of fact here in dispute. The Court has concluded that the clause of the insurance contract here in controversy dealing with the payment of interest must be construed so as to require Plaintiff to pay all interest (pre-judgment and post-judgment) on all damages for which the insured is found liable.

In due course, the Court will issue its memorandum of decision and, at that time, Defendants will be called upon to serve and file a proposed judgment. The Court's rulings on the cross-motions for summary judgment shall not be deemed final for purposes of appeal until such formal judgment is entered.

DATED at Anchorage, Alaska, this 13th day of January, 1987.

H. Russell Holland
United States District Judge

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
an Illinois corporation,
Plaintiff,

vs.

RANDY A. SCHAAL, LAURA L. SCHAAL,
DAVID HEARN and JEANNINE HEARN,
Defendants

No. A86-001 Civil

FINAL JUDGMENT

Upon the parties' motions for summary judgment, oral argument being had thereon, and the court being fully advised in the premises, Plaintiff's motion for summary judgment is denied, and Defendants' motion for summary judgment is granted, in accordance with the Memorandum of Decision of the court as dated the 17th day of January, 1987. Defendants Hearn are awarded attorney's fees in the amount of $_____.

DATED this 3rd day of January, 1987.

H. Russell Holland
Judge of the U.S. District Court

APPENDIX E

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation,
Plaintiff

vs.

RANDY A. SCHAAL, LAURA L. SCHAAL, DAVID HEARN, AND JEANNINE HEARN,
Defendants

No. A86-001 Civil

ORDER
(Reconsideration Denied; Objection to Form of Judgment Rejected)

Plaintiff has moved the Court to reconsider its memorandum of decision dated January 17, 1987. The motion is opposed. Oral argument has been requested.

The motion for reconsideration is denied without oral argument.

By and large, the arguments which Plaintiff makes in support of reconsideration are a repetition of matters which have already been urged to and considered by the Court. Reconsideration is not appropriate under these circumstances.

Plaintiff suggests that the Court has refused to consider extrinsic evidence which, it is contended, should be considered as a matter of law by the Court. In fact, the Court has fully considered such extrinsic evidence as Plaintiffs have offered, and the same has been found unpersuasive. Indeed, much of the so-called extrinsic evidence is nothing more than argument about the result which will follow upon enforcement of the Court's interpretation of Plaintiff's policy of insurance. Even though such material is not strictly pertinent to the intention of the parties at the time they entered into the insurance contract, the Court

has considered Plaintiff's arguments with a view towards testing the reasonableness of the result reached.

The Court does not lightly render a decision which will in all probability cause Plaintiff to pay out more in pre-judgment interest than it is obligated to pay under the primary coverage portions of its policy. As already pointed out in the Court's memorandum of decision, the court ultimately came to the conclusion that it was straining too hard and indeed was rewriting Plaintiff's policy in an effort to ameliorate the results of which Plaintiff complains. In the last analysis, this Court is bound by the Alaska Supreme Court rules for interpreting insurance policies, not the least of which is the requirement that they be viewed as contracts of adhesion and that they be construed as a layman would reasonably understand them. In one sentence, the Court has concluded that a reasonable layman would understand that, under the subject policy, his insurance carrier has obligated itself to pay all interest which as a matter of law accrues while the insurer is defending the case and until, if the case is not settled, the insurer tenders what it owes on any adverse judgment against the insured.

Plaintiff has also objected to the form of judgment proposed by Defendants and signed by the Court on January 31, 1987. The judgment was entered prior to the foregoing objection coming to the Court's attention.

The forms of judgment which Plaintiff suggests are most certainly appropriate where declaratory actions are decided after trial. This case was decided on motion for summary judgment. The court has filed a detailed memorandum of its decision which is in substance incorporated by reference into the final judgment. The Court does not deem any further recitation of its determination of this case in the judgment to be necessary.

Plaintiff's objection to the form of judgment is rejected.

DATED at Anchorage, Alaska, this 4th day of March, 1987.

H. Russell Holland
United States District Judge

APPENDIX F

IMPORTANT INFORMATION ABOUT CHANGES IN YOUR CAR POLICY . . .

State Farm has made some changes in your car policy. The change under Liability Coverage results in a restriction of coverage, while the other changes merely clarify your coverage. Please determine the coverages you carry and note changes which apply to you.

Under Liability — Coverage A

If the law requires you to pay interest for a period of time before a judgment is entered against you, we will pay the interest on that portion of the judgment that is payable under your policy. This does not change our obligation to pay interest that accumulates after a judgment is entered.

6994.1 Amendatory Endorsement

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement.

Effective as explained in this insert.

Issued by the STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY of Bloomington, Illinois, or the STATE FARM FIRE AND CASUALTY COMPANY of Bloomington, Illinois, as shown by the company's name on the policy of which this endorsement is a part.

In consideration of the premium charged, it is agreed that *your* policy is changed as follows:

1. LIABILITY — COVERAGE A

   Item 2 under "In addition to the limits of liability, we will pay for an *insured* any costs listed below resulting from such accident," is changed to read:

   2. Interest on damages owed by the *insured* due to a judgment and accruing:

a. after the judgment, and until we pay, offer or deposit in court, the amount due under this coverage; or
b. before the judgment, where owed by law, but only on that part of the judgment we pay.

. . .

This brochure is only a general description of coverage and/or coverage changes and is not a statement of contract. All coverages are subject to the insuring agreements, exclusions and conditions of the policy and applicable endorsements, including the endorsement contained herein.

STATE FARM INSURANCE COMPANIES
Home Offices, Bloomington, IL 61710

APPENDIX G

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation,
Plaintiff

vs.

RANDY A. SCHAAL, LAURA L. SCHAAL, DAVID HEARN, AND JEANNINE HEARN,
Defendants

No. A86-001 Civil

REQUEST FOR CERTIFICATION OF QUESTION OF LAW TO ALASKA SUPREME COURT

COMES NOW Robert H. Wagstaff, counsel for Defendants David and Jeannine Hearn, and request this court to certify the question as presented in Defendants Hearn's Motion for Summary Judgment to the Alaska Supreme Court for decision. This motion is supported by the attached memorandum, the Memorandum in Support of Motion for Summary Judgment, and a copy of the Complaint filed in the Alaska Superior Court.

DATED at Anchorage, Alaska, this 10th day of February, 1986.

Robert H. Wagstaff
Attorney for Defendants Hearn

APPENDIX H

February 5, 1988

VIA D.H.L. EXPRESS

Clerk of Court
U.S. Court of Appeals
7th & Mission Streets
P.O. Box 547
San Francisco, California 94101

Clerk of Court, U.S. Courthouse
9th Circuit Court of Appeals
1010 5th Avenue
Seattle, Washington 98104

Re: State Farm v. Hearn
Case No. 87-3752
Our File No. 2042.05

Dear Sir:

I would appreciate your bringing this letter to the attention of the panel that heard the above-referenced case. At the oral argument of February 4, 1988, in Seattle, Appellant State Farm commented in rebuttal that I may have misstated the language of the applicable insurance policy. I had no opportunity to reply. In order that there be no misunderstanding, I wish to clarify Appellees position. The supplemental payment section of the policy states in pertinent part as follows:

> In addition to the limits of liability, we will pay for an insured any costs listed below resulting from such accident.
>
> 1. Court costs of any suit for damages.
> 2. Interest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage.

Emphasis on "insured" is in the policy itself and of State Farm's choosing. I have emphasized "any" and "all" as we believe these to be important and controlling words. Thus the operative language in effect commits State Farm to pay: "[Any] interest on all damages." The word "any" before "costs" as set out above, modifies and applies to the word "interest" which is included in the designated supplemental coverage as a cost.

We also do not oppose certification of this state law question to the Alaska Supreme Court. *Guin v. Ha,* 591 P.2d 1281 (Alaska 1979) does not apply to these facts. There was no supplementary payments clause dealing with interest in *Guin* as there is here. Indeed that Court stated:

> "In order to hold the insurer liable for such pre-judgment interest, the insurer must have assumed such an obligation in the contract or, alternatively, public policy must intervene and impose the obligation despite the terms of the insurance contract."

Noting specifically that,

> "Appellant Guin does not attempt to bring her claim for pre-judgment interest within any express provision of the insurance policy."
>
> ★ ★ ★ ★
>
> "Finally, interest is nowhere mentioned in the contract of insurance. Nothing in the supplemental payment clause can be construed as imposing upon the insurer the obligation to pay pre-judgment interest."

Id. at 1284, 1285 and 1289, respectively. The District Court here has found exactly the opposite. It is the meaning of that very clause that is in dispute.

The Hearns claim pre-judgment interest under the express terms of the insurance policy as set forth above. This is what distinguishes *Guin* from the case at bar. *Guin* does not prohibit pre-judgment interest in excess of policy limits as a matter of

public policy. It merely requires it to be a part of the contractual agreement.

Finally, I wish to raise a point of what amounts to personal privilege. Throughout their Brief and oral argument, State Farm has asserted that the Hearns are after "millions," the "pot of gold," and even suggesting on rebuttal that reason has been clouded in this "far fetched" quest for lucre. David Hearn was rendered quadriplegic by State Farm's insured. He will be confined to a wheelchair for the rest of his life and has no bladder or bowel control. His wife spends her entire life caring for him. They are here seeking only fair compensation for this unwelcome ordeal.

State Farm chose to do business in Alaska where the rules of interpretation of insurance contracts are well known. The supplementary payments section of State Farm's insurance policy relating to interest is language of their own choosing. If the Hearn's position is so "far fetched," then State Farm did not need to change the wording of its policies announcing that there was to be a reduction of coverage on pre-judgment interest benefits to "that part of the judgment we pay" (Addendum 1, Brief of Appellee).

Thank you for the opportunity to comment.

Very truly yours,

Robert H. Wagstaff

APPENDIX I

May 23, 1989

Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Re: State Farm Mutual v. Hearn
No. 87-3752

Dear Clerk:

Pursuant to Circuit Rule 36-4, Plaintiff-Appellant State Farm Mutual Automobile Insurance Company ("State Farm") hereby requests that the Memorandum disposition of the above-referenced matter by this Court that was filed on February 27, 1989, (as amended pursuant to Court Order filed on May 10, 1989, in which the Petition for Rehearing was denied) be published.

The reasons why the Memorandum disposition should be published are, as set forth in Circuit Rule 36-2:

1. The Memorandum disposition clarifies the important rule of law set forth in *Guin v. Ha,* 591 P.2d 1281 (Alaska 1979), regarding the liability of insurance companies for pre-judgment interest as an element of compensatory damages and to the extent of the liability limitations stated in the insurance contract.

2. The Memorandum disposition involves a legal issue of substantial public importance — the applicability and construction of a contractual provision in a commonly used insurance contract and the liability of an insurance company under that contract for pre-judgment interest.

The substantial public importance of the Memorandum disposition by this Court in this matter is borne out by the Petition for Rehearing with Suggestion for Rehearing En Banc filed by the Defendants-Appellees in this matter and also by the

Motion and Supporting Memorandum filed by the Alaska Academy of Trial Lawyers in which that Academy sought to appear as amicus curiae in support of the Petition for Rehearing and Suggestion for Rehearing En Banc.

It is clear from the Petition for Rehearing and the Motion and Memorandum filed by the Alaska Academy of Trial Lawyers that the attorneys for Defendants-Appellees and the Alaska Academy of Trial Lawyers continue to believe that the clarification by this Court of the rule of law set forth in *Guin v. Ha.*, supra, is inconsistent with the decision of the Alaska Supreme Court in *Schultz v. Travelers Indem. Co.*, 754 P.2d 265 (Alaska 1988). However, the fact that supplemental briefs were requested by this Court and filed by the parties in this matter as to the *Schultz* case and this Court's Order filed on May 10, 1989, in which it amended its Memorandum disposition to clarify its ruling vis-a-vis the *Schultz* decision are further evidence of why the Memorandum disposition should be published.

Pursuant to Circuit Rule 36-4, a copy of this letter has been mailed to opposing counsel this date.

Very truly yours,

I. Franklin Hunsaker

APPENDIX J

ALASKA RULE OF APPELLATE PROCEDURE 407. CERTIFICATION OF QUESTIONS OF STATE LAW

(a) The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, or a United States district court, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

(b) This rule may be invoked by an order of any of the courts referred to in Section (a).

(c) A certification order shall set forth:

(1) The questions of law to be answered; and

(2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(d) The certification order shall be prepared by the certifying court, signed by the judge presiding over the cause, and forwarded to the supreme court by the clerk of the certifying court under its official seal. The supreme court may require the certifying court to file the original or copies of all or any portion of the record before the certifying court if, in the opinion of the supreme court, the record or portion thereof may be necessary in answering the questions.

(e) Notice of the supreme court's decision whether to answer the questions certified to it shall be given to the certifying court by the clerk of the supreme court. Further proceedings, if any, in the supreme court shall be in accordance with the provisions of these rules governing briefs and arguments, unless otherwise ordered by the court.

(f) The written opinion of the supreme court stating the law governing the questions certified shall be sent by the clerk of

the supreme court to the certifying court and to the parties. The answer to the certified questions shall be res judicata as to the parties and have the same precedential force as any other appellate decision of the supreme court.

APPENDIX K

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant

vs.

DAVID HEARN; JEANNE HEARN,
Defendants/Appellees

No. 87-3752
D.C. No. CV-86-001-HRH

MOTION AND SUPPORTING MEMORANDUM TO ALLOW PARTICIPATION OF AMICUS CURIAE ALASKA ACADEMY OF TRIAL LAWYERS IN SUPPORT OF DEFENDANTS/APPELLEES HEARNS' PETITION FOR REHEARING EN BANC

I. INTRODUCTION

COMES NOW the Alaska Academy of Trial Lawyers and requests this Court's permission to proceed as Amicus Curiae in support of Defendants/Appellees' Petition for Rehearing EN BANC. Amicus is of the belief that the Memoranda Panel has directly failed to follow controlling authority of the Alaska Supreme Court including specifically *Guin v. Ha,* 591 P.2d 1281 (Alaska 1979); *Stordahl v. Government Employees' Insurance Company,* 564 P.2d 63 (Alaska 1977) and the very recent case of *Schultz v. Travelers' Indemnity Co.,* 745 P.2d 265 (Alaska 1988). The Panel's failure to follow this clear controlling authority is in direct violation of the United States Supreme Court Decision in *Erie Railroad Company, v. Tompkins,* 304 U.S. 64 (1938).

A. Interest of Amicus

The Alaska Academy of Trial Lawyers is an association of 175 lawyers located throughout the State of Alaska that is

dedicated to the furtherance of the legal profession and the protection of the rights of individual litigants in Alaska. The Alaska Academy of Trial Lawyers believes that the Memoranda Panel has departed significantly from clear and conclusive Alaska decisional authority so as to require us to speak on Defendants/Appellees Hearns' behalf in support of their Petition for Rehearing EN BANC.

II. ARGUMENT

The clear operational language of the insurance policy in question states that: "In addition to the limits of liability, we will pay for an insured . . . any . . . interest on all damages owed by the insured as a result of a judgment . . . ." Under Alaska law the provisions of an insurance policy are to be construed to provide the coverage which a lay person would have reasonably expected given a lay interpretation of the policy language. *Stordahl v. Government Employees' Insurance Co.*, 564 P.2d 63, 66 (Alaska 1977). Such coverage must be construed broadly with any ambiguities resolved in the favor of the insured. *Hahn v. Alaska Title and Guaranty*, 557 P.2d 143, 144-145 (Alaska 1976). Under the language of the policy in question, a reasonable person would readily conclude that pre-judgment interest is included in the stated Supplementary Payments Clause of the insurance policy at bar, particularly when pre-judgment interest is no where excluded. *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979) does not command a different result, indeed the opposite is true. There was no supplementary payments clause dealing with interest in *Guin* as there is here. The *Guin* Court in fact stated:

> "In order to hold the insurer liable for such pre-judgment interest, the insurer must have assumed such an obligation in the contract, or alternatively, public policy must intervene and impose the obligation despite the terms of the insurance contract."

Noting specifically that:

> "Appellant Guin does not attempt to bring her claim for pre-judgment interest within any express provision of the insurance policy."
>
> ★ ★ ★ ★
>
> "Finally, interest is nowhere mentioned in the contract of insurance. Nothing in the supplemental payment clause can be construed as imposing upon the insurer the obligation to pay pre-judgment interest."

Id. at 1284, 1285 and 1289, respectively.

Despite the above explicit language, the Panel is apparently of the mistaken belief that *Guin* requires that an insurer can never be liable for pre-judgment interest regardless of the policy language. This is incorrect. The *Guin* court stated succinctly:

> [2, 3] In this appeal, the central issue is whether the obligation to pay pre-judgment interest exceeding policy limits should be shifted from an insured defendant, who is concededly liable for such interest, to an insurer with whom the defendant holds a policy. An obligation to pay such interest does not arise by virtue of the mere fact that the parties have entered into an insurance contract. In order to hold the insurer liable for such pre-judgment interest, the insurer must have assumed such an obligation in the contract or, alternatively, public policy must intervene and impose the obligation despite the terms of the insurance.
>
> Guin argues that since a tort defendant is liable for pre-judgment interest, public policy requires that the defendant's insurance carrier should be liable for such interest, regardless of policy language, because the insurance company has the use and benefit of the money between the date of injury and the date of judgment.
>
> ★ ★ ★ ★

> We shall first examine the insurance contract to determine if it imposes upon the insurer an obligation to pay pre-judgment interest in excess of policy limits. We shall then turn to an analysis of the public policy arguments advanced by Guin to determine if they require insurers to assume liability for pre-judgment interest exceeding policy limits regardless of the terms of the insurance contract.

The Alaska Supreme Court not only recognized that an insurer could be held liable for pre-judgment interest but it told specifically how "the insurer must have assumed such an obligation in the contract." That is what has occurred in the case at bar. The *Guin* court simply held that as pre-judgment interest was nowhere mentioned in the insurance contract, and had not been bargained for, that pre-judgment interest would not be automatically assessed against the insurer, even though it remained the insured's obligation. In the second to the last paragraph of the Opinion, the Court specifically noted:

> Furthermore, the insured defendant need not be caught in the bind of pre-judgment interest liability. The insured may protect himself by obtaining additional insurance coverage in an amount sufficient to include pre-judgment interest which otherwise would exceed applicable policy limits.

Here the insured has done exactly that. In the very recent Alaska Supreme Court case of *Schultz v. Travelers' Indemnity Co.*, 745 P.2d 265 (Alaska 1988) the Alaska Supreme Court citing *Guin,* determined that the maximum limits of insurance coverage under that insurance policy included the face value limit of $100,000.00 per passenger plus pre-judgment interest.

> The insurance contract also obligated Travelers to pay unlimited court costs. This language, as construed by the Alaska Supreme Court, obligates Travelers to pay Rule 82 attorney's fees as an

> additional item of policy coverage on the full amount of a jury verdict rendered against the insured defendant. *Guin v. Ha,* 591 P.2d 1281, 1285-86 [(Alaska 1979)]; *Weekman v. Houger,* 464 P.2d [528] (Alaska 1970); *Continental Insurance Co. v. Bayless and Roberts, Inc.,* 608 P.2d [281] (Alaska 1980).
>
> ★ ★ ★ ★
>
> This holding is required, at least by implication, by the Alaska Supreme Court opinion in *Continental Insurance Co. v. Bayless and Roberts,* 608 P.2d 28, 285, n. 6 and 295-96, n. 22 (Alaska 1980). See [also] *Salmine v. Knagin,* 645 P.2d 148, 150, n. 8 (Alaska 1982); *Insurance Co. of North America v. State Farm Mutual Auto Insurance Co.,* 663 P.2d 953, 954, n. 1 (Alaska 1983). Travelers had the legal duty to make a determination as to the amount of a money judgment which might be rendered against its insured. In order to protect its insured, Travelers then had the duty to tender in settlement that portion of the projected money judgment which Travelers contractually agreed to pay. That amount, $100,000 per passenge, plus Rule 82 fees on the sum of the projected verdict plus pre-judgment interest, is policy limits. (emphasis supplied).

The Memoranda Panel's Decision is in direct defiance of this authority wherein the Alaska Supreme Court has held directly that pre-judgment interest under the policy were not included as damages, but were to be identified and computed separately. In *Schultz* as with the case at bar, interest is mentioned specifically in the insurance contract. Amicus is disturbed that the Memoranda Panel does not even attempt to address or answer the decision of the Alaska Supreme Court in *Schultz* noting only that *Schultz* "does not change the legal principle established in

Guin v. Ha." As such, Amicus believes that this case presents a serious issue of comity between the Alaska Supreme Court and the Ninth Circuit Court of Appeals. As such this matter should at the very least be certified to the Supreme Court of Alaska pursuant to *Lehman Brothers v. Schein,* 416 U.S. 386 (1974) wherein the United States Supreme Court in remanding for consideration of certification stated:

> Here resort to [Certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

III. CONCLUSION

For the foregoing reasons, Amicus Curiae Alaska Academy of Trial Lawyers respectfully requests this Court to seriously review the significant issue of comity presented in Defendants/Appellees Hearns' Petition for Rehearing EN BANC. The Memoranda Panel has acted in direct contravention of Alaska decisional authority. Rehearing EN BANC is justified under these circumstances in order to correct this most egregious wrong.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 9th day of March, 1989.

Dennis M. Mestas
President Alaska Trial Lawyers
Association